Jurisdictional Statement

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No. ___

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

Metrocentre Improvement District No. 1,
City of Little Rock, Arkansas ..... *Appellant*

V.

Federal Reserve Bank of St. Louis ..... *Appellee*

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Does immunity from taxation of an agency or instrumentality of the United States based upon the Supremacy Clause of the United States Constitution include immunity from assessments by a local improvement district?

II. If constitutional immunity from taxation includes immunity from assessments by a local improvement district, does the Federal Reserve Bank of St. Louis perform governmental functions to the extent necessary to be considered an agency or instrumentality of the United States for purposes of such constitutional immunity?

III. If constitutional immunity from taxation includes immunity from assessments by a local improvement district, is the waiver of immunity from "real estate taxes" under 12 U.S.C. Sec. 531 a waiver of immunity from assessments for benefits conferred on real estate located within an improvement district?

IV. If the Federal Reserve Bank is an agency or instrumentality of the United States, is it subject to the provisions of Ark. Stat. Ann. Sec. 20-416 (1968 Repl.) requiring timely objection to assessment?

TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 2

Statement of the Case 9

The Questions Presented Are Substantial 12

Appendix 16

Opinion of the United States Court of Appeals for the Eighth Circuit 16

Opinion of the United States District Court for the Eastern District of Arkansas, Western Division 22

Judgment Appealed From 33

Notice of Appeal 35

TABLE OF AUTHORITIES

Cases Page

City of Detroit v. The Murray Corporation of America, 355 U.S. 489 (1958) 2

Illinois Central Railroad v. Decatur, 147 U.S. 190 (1893) 12

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) . 12, 13

Swords v. Nutt, 11 F.2d 936 (9th Cir. 1926) 13

Statutes - Arkansas

Ark. Stat. Ann. Sec. 20-104 (1981 Cum. Supp) 9

Ark. Stat. Ann. Sec. 20-404 (1968 Repl.) 2, 3-4

Ark. Stat. Ann. Sec. 20-414 (1968 Repl.) 2, 4

Ark. Stat. Ann. Sec. 20-416 (1968 Repl.) ..... i, 2, 4-5

Ark. Stat. Ann. Sec. 20-418.1 (1968 Repl.) 2, 5

Ark. Stat. Ann. Sec. 20-1604 (1981 Cum. Supp.) 2, 5-6

Little Rock, Arkansas Ordinance No. 13,196 (September 7, 1976) 6-8, 9

Statutes - Federal

12 U.S.C. Sec. 531 ..... i, 2, 3, 9, 10, 14

12 U.S.C. Sec. 632 2

28 U.S.C. Sec. 1254 (2) 2

United States Constitution

U.S. CONST. art. VI, cl. 2. ..... i, 12, 13, 14

U.S. CONST. amend. X. 3

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eighth Circuit appears in the appendix hereto, p. 16. *infra* and has not been reported at time of this filing.

The decision of the United States District Court for the Eastern District of Arkansas, Western Division, is reported at 492 F. Supp. 353 (E.D. Ark. 1980). It is reprinted in the appendix hereto, p. 22, *infra*.

JURISDICTION

The Federal Reserve Bank of St. Louis ("Federal Reserve Bank") brought suit against Metrocentre Improvement District, No. 1, City of Little Rock, Arkansas, in the United States District Court, Eastern District of Arkansas, Western Division. It sought a declaratory judgment that it was immune from special assessment on its real estate pursuant to 12 U.S.C. Sec. 531. The matter in controversy exceeded $10,000 and jurisdiction was based on 12 U.S.C. Sec. 632. The District Court found that the Federal Reserve Bank was not immune from special assessment and the Federal Reserve Bank appealed to the United States Court of Appeals for the Eighth Circuit, which reversed the District Court. It entered its judgment on August 11, 1981, holding the Federal Reserve Bank immune from special assessment for benefits conferred to its real estate.

A notice of appeal to this Court was duly filed in the United States Court of Appeals for the Eighth Circuit on October 9, 1981. See appendix at p. 16, *infra*.

This appeal is being docketed in this Court within 90 days from the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (2). The effect of the opinion of the Court of Appeals for the Eighth Circuit was to hold Ark. Stat. Ann. Secs. 20-404, 20-414, 20-416, 20-418.1 and 20-1604 unconstitutional as applied to the Federal Reserve Bank. An appeal to the United States Supreme Court is proper under *City of Detroit v. The Murray Corporation of America*, 355 U.S. 489 (1958).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, Clause 2 of the United States Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof;

and all Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby; anything in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. Sec. 531:

Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom, shall be exempt from Federal, State and local taxation, except for real estate taxes.

Tenth Amendment of the United States Constitution:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 20, Section 404 of the Arkansas Statutes Annotated:

Each of said assessors shall, before entering upon the discharge of his duties, take oath that he will well and truly assess, to the best of his knowledge and ability, the value of all the benefits to be received by each landowner by reason of the proposed improvements as effecting [affecting] each of said lots, blocks, or parcels of land or railroad tracks and right-of-way within said district, and they shall at once proceed to inscribe in a book to be used for that purpose the description of each of said lots, blocks or parcels of land and railroad tracks and right-of-way and shall assess the value of the benefit to accrue to each of said lots, blocks or parcels of land and railroad tracks and right-of-way by reason of such improvement, which assessment of said benefits they shall enter upon said book opposite the

description thereof; and they shall then subscribe said assessment and deposit it in the office of the recorder or city clerk of such town or city, where it shall be kept and preserved as a public record. Provided, said assessment may be annually readjusted according to additional improvements placed upon the lands, railroad tracks and right-of-way when a succession of collections is necessary to pay for the improvements. [Act May 8, 1899, No. 183, §2, p. 323; May 3, 1901, No. 143, §3, p. 264; Apr. 13, 1907, No. 167, §2, p. 402; May 28, 1907, No. 406, §1 (1st par.), p. 1023; C. & M. Dig., §5658; Pope's Dig., §7293.]

Title 20, Section 414 of the Arkansas Statutes Annotated:

Said local assessment shall be a charge and a lien against all the real property in said district from the date of said ordinance, and shall be entitled to preference over all judgments, executions, incumbrances or liens whensoever created, and shall continue until such local assessment, with any penalty and costs that may accrue thereon, shall be paid; provided, as between grantor and grantee all payments not due at the date of the transfer of such real property shall be payable by the grantee. [Act Mar. 22, 1881, No. 84, §5 (6th sentence), p. 161; May 8, 1899, No. 183, §7 (2nd sentence), p. 323; May 3, 1901, No. 143, §5 (2nd sentence), p. 264; C. & M. Dig., §5667; Pope's Dig., §7306.]

Title 20, Section 416 of the Arkansas Statutes Annotated:

Within thirty [30] days after the passage of the ordinance mentioned above, the recorder or city clerk shall publish a copy of it in some newspaper published and having a bona fide circulation in such town or city for one time, or if no newspaper be

published in said city or town, then in some newspaper published in the county; and if no newspaper be published in the county then by posting in at least ten [10] conspicuous places in the city or town. Within thirty [30] days after such publication the district or any property owner may bring suit in the chancery court of the county for the purpose of correcting or invalidating such assessment; but if such suit is not brought within that time all objections to the creation of the district or the validity of the assessment shall be forever barred and precluded. [Act Mar. 22, 1881, No. 84, Sec. 6, p. 161; May 8, 1899, No. 183, Sec. 8, p. 323; May 3, 1901, No. 143, Sec. 6, p. 264; 1913, No. 5, Sec. 2, p. 27; C&M Dig., Sec. 5668; Act 1929, No. 64, Sec. 13, p. 241; Pete's Dig., Sec. 730.]

Title 20, Section 418.1 of the Arkanas Statutes Annotated:

The Collector shall collect that part of the assessment extended against each lot, block or parcel of land as specified in the certified copy of assessment of benefits filed with him. Within thirty [30] days after the expiration of the time for paying the first annual assessment the Collector shall pay to the County Treasurer for the credit of the district all moneys received by him in the payment of the said first annual special assessment, less the fees allowed him by the provisions of Section 14 [§20-418.10] hereof. The County Treasurer shall immediately pay all funds so paid to him by the Collector to the Board of Commissioners or other persons authorized to receive the same, less the fees allowed by the provisions of Section 14 [§20-418.10] hereof. [Acts 1949, No. 195, §5, p. 598.]

Title 20, Section 1604 of the Arkansas Statutes Annotated:

Except as otherwise provided in this act [Secs. 20-1601—20-1624], the provisions of Act 84 of March 22, 1881, Act 183 of May 8, 1899, and all other laws of the State of Arkansas pertaining to municipal improvement districts, in general, as the same have been and may be from time to time amended, shall be applicable to a central business improvement district, and shall govern the procedures for the operation of a District's affairs, including without limitation, the giving of any notice, appointment of assessors, making and filing of assessments of benefits or reassessments of benefits, annexation of additional territory to a District, collection of assessments, enforcement of delinquent assessments, and all other matters relating to the internal operation of a District. [Acts 1973, No. 162, Sec. 5, p. 540].

Little Rock, Arkansas Ordinance No. 13,196 (September 7, 1976):

WHEREAS, a two-thirds majority in value of the property holders owning property adjoining the locality to be affected and situated in Metrocentre Improvement District No. 1 of Little Rock, Arkansas organized for the purpose of constructing, establishing and operating a shopping mall or malls, sidewalks, plazas, landscaping, fountains, and such other improvements, facilities, services and equipment as may be authorized by Act 162 of the Acts of the General Assembly for the State of Arkansas for the year 1973, have petitioned the Board of Directors of the City of Little Rock for the construction of said improvement, and that the cost thereof shall be assessed upon the real property of said District according to the benefits received; and

WHEREAS, said benefits received by each and every block, lot and parcel of real property situated in said District equals or exceeds the local assessment thereon; and

WHEREAS, the estimated cost of said improvement is $4,585,000 (exclusive of funds to be provided by the City of Little Rock):

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF LITTLE ROCK, ARKANSAS:

Section 1. That the several blocks, lots and parcels of real property in said Metrocentre Improvement District No. 1 of Little Rock, Arkansas be assessed according to the Assessment List for said Improvement District as the same now remains in the office of the City Clerk, and that 3.85% of the assessment of each of the said blocks, lots and parcels shall be collected by the County Collector with the first installment of general taxes becoming due in the year 1977 and annually thereafter; provided, however, that in years subsequent to 1977 the installment of the annual assessment required to be paid hereunder may be paid in quarterly installments along with the quarterly installments of ad valorem taxes, at the election of the taxpayer. Said annual installments shall continue to be paid until the whole of said local assessment shall have been paid. Said levy of 3.85% includes the supplemental annual assessment of .50% recommended by the Board of Commissioners of said Improvement District for the purposes of operation, maintenance, repair and replacement as authorized in the petitions filed requesting formation of said Improvement District and said Act 162 of 1973.

Section 2. All ordinances and parts of ordinances in conflict herewith are repealed, and this Ordinance shall be in full force and effect from and after its passage.

PASSED: September 7, 1976.

APPROVED

/s/ Perlesta Hollingsworth

Assistant Mayor

ATTEST:

/s/ Jane Czech
City Clerk

STATEMENT OF THE CASE

Metrocentre Improvement District No. 1, City of Little Rock, Arkansas (the "District") was created by an ordinance adopted by the City of Little Rock on October 16, 1973. Pursuant to Ark. Stats. Ann. Sec. 20-104, owners of a two-thirds majority in value of the property within the District petitioned the City for the formation of the District for the purpose of constructing improvements on public property within the central business district of Little Rock. A Board of Assessors assessed the benefits conferred upon all property within the District by the improvements. By an ordinance adopted on September 7, 1976, the Board of Directors of the City of Little Rock approved the assessment list for the District, finding that the benefits conferred by the construction of the improvements equalled or exceeded the assessment on each parcel within the District, and the Board of Directors ordered that a levy of 3.85% of the assessment be collected annually.

The Federal Reserve Bank holds title to Lots 1 through 10 of Block 94 in Little Rock, all of which is located within the District. The annual levy on the property owned by the Federal Reserve Bank is $12,854, payable from 1972 to 2002.

On April 12, 1977, three and one half years after the formation of the improvement district and over six months after it had been assessed, the Federal Reserve Bank filed suit in the United States District Court, Eastern District of Arkansas, Western Division, seeking a declaratory judgment that it was immune from special assessment by the District under 12 U.S.C. Sec. 531. The District answered and (1) denied that the Federal Reserve Bank was an agency or instrumentality of the United States and (2) denied that the Federal Reserve Bank was immune from special assessment. These issues were also addressed by the District's response to the Federal Reserve Bank's motion for summary judgment. The District's motion for summary judgment and amendment to answer also raised the issue of

whether the Federal Reserve Bank failed to contest the assessment within the time required by State law. Ark. Stat. Ann. Sec. 20-416 (1968 Repl.).

On June 23, 1980, the District Court decided the case on the merits and found in favor of the District on the grounds (1) that the Federal Reserve Bank was not an agency or instrumentality of the United States, (2) that it failed to comply with Ark. Stat. Ann. Sec. 20-416 (1968 Repl.) and (3) that 12 U.S.C. Sec. 531 did not apply. The District Court dismissed the complaint against the District with prejudice. On June 27, 1980 the District Court entered judgment in favor of the District in the amount of $50,165 for the unpaid accrued annual levies on the assessment of benefits.

The Federal Reserve Bank appealed to the Court of Appeals for the Eighth Circuit from the District Court's decision. On August 11, 1981, the United States Court of Appeals for the Eighth Circuit entered its judgment reversing the District Court. The District appeals from the judgment of the Eighth Circuit.

All of the questions presented on appeal to the United States Supreme Court were preserved on appeal to the Court of Appeals for the Eighth Circuit by the Federal Reserve Bank. All of these questions were resolved in favor of the Federal Reserve Bank by the Eighth Circuit Court of Appeals, which held (1) that constitutional immunity from taxation includes immunity from assessment by local improvement districts; (2) that the Federal Reserve Bank is an instrumentality of the United States; (3) that the waiver of immunity from the real estate tax under 12 U.S.C. Sec. 531 does not extend to special assessments on real estate; and (4) that since congressional waiver of immunity is required, the Federal Reserve Bank's failure to contest the assessment within the time required by state law does not affect the result.

Facts bearing on the issue of whether the Federal Reserve Bank is an instrumentality of the United States were considered by the District Court and the Court of Appeals for the Eighth Circuit. The nature and functions of the Federal Reserve Bank were also considered. Federal reserve banks are only one of five components of the Federal Reserve System which consists of (1) the Board of Governors; (2) the Federal Open Market Committee; (3) the Federal Advisory Counsel; (4) the federal reserve banks; and (5) member commercial banks which include all national banks and state chartered banks that have voluntarily joined the system. None of the capital stock of the Federal Reserve Bank of St. Louis is owned by the United States or any government entity, agency or instrumentality. All of the capital stock of the Federal Reserve Bank of St. Louis is owned by private member commercial banks. The relationship of the Federal Reserve Bank to member banks is similar to the relationship that a commercial bank has to its depositors. The Federal Reserve Bank performs the following services for its member banks: (1) providing currency and coin; (2) transfer of funds by wire; (3) automated clearing house services; (4) safekeeping services; (5) check processing services; (6) services related to government security; and (7) statistical analysis.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Supremacy Clause Immunity From Taxation Does Not Include Immunity From Assessments of Benefits To Real Estate by Local Improvement Districts.

The Eighth Circuit Court of Appeals rejected a distinction between an assessment for benefits conferred on real estate and a general tax, and held that all agencies and instrumentalities of the United States are immune from special assessments. As authority for this holding, the court relied on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *McCulloch*, however, did not deal with the imposition of a special assessment of benefits to real estate. It dealt with a tax which was levied on the operations of the Bank of the United States. The reasoning that supported *McCulloch v. Maryland, supra*, does not support the extension of constitutional immunity to the assessment of benefits to real estate by local improvement districts. There is no United States Supreme Court authority on point.

However, there is Supreme Court authority for treating special assessments on real estate differently from taxes. In *Illinois Central Railroad v. Decatur*, 147 U.S. 190 (1893), the United States Supreme Court held that an exemption from taxation was to be viewed as an exemption from the burden of ordinary taxes as opposed to special assessments. An exemption from taxation did not relieve the taxpayer from the obligation to pay special assessments from benefits conferred to his real estate. The Court reasoned that a general levy of taxes is accepted in return for general benefits of government. Special assessments, on the other hand, are made on the assumption that a designated portion of the community has been peculiarly benefited by virtue of the selective enhancement in the value of the property of that portion of the community. The special assessment is made in addition to a general levy of taxes, but property owners who are assessed are not caused to suffer a pecuniary loss. They have received a benefit in

exchange for the assessment. They are made to bear the cost of a public work, but they are specially and peculiarly benefited by it. The public as a whole is not so benefited. Based on the factual distinctions between general taxes and special assessments, the United States Supreme Court should refrain from extending constitutional immunity to special assessments on real estate.

The Court of Appeals for the Ninth Circuit decided a similar issue in favor of an improvement district in *Swords v. Nutt*, 11 F.2d 936 (9th Cir. 1926). It held that a national bank was not immune from special assessment levied upon the real estate of the bank. Its holding was impliedly based upon (1) the nonapplicability of a state statute exempting mandatories of the United States from local taxation and (2) the nonapplicability of the Supremacy Clause immunity found in *McCulloch v. Maryland*, *supra*. *Swords v. Nutt*, *supra* at 937. The decision of the Eighth Circuit from which the District appeals implicitly conflicts with the Ninth Circuit opinion.

The Federal Reserve Bank Does Not Perform Governmental Functions To The Extent Necessary To Be Considered An Agency Or Instrumentality Of The United States For Purposes Of Constitutional Immunity.

The legislative history of the Federal Reserve System demonstrates that Congress intended the regional federal reserve banks to be non-governmental entities, separate and distinct from the United States, owned by member commercial banks and designed to function primarily for private purposes. A federal reserve bank is essentially a bank for banks. Although it is authorized to act as a fiscal agent of the United States, all federally insured national and state-chartered banks and savings and loan associations are likewise designated as fiscal agents of the United States. Since the Federal Reserve Bank does not primarily serve a governmental function, it is not an agency or

instrumentality of the United States for purposes of Supremacy Clause immunity. It does not primarily serve a governmental function.

There is no United States Supreme Court decision on this issue even though the status of the Federal Reserve Bank as an agency or instrumentality is an issue under other statutes such as the Federal Tort Claims Act, 28 U.S.C. 1346; the Equal Employment Opportunity Act, 42 U.S.C. 2000e; the Service Contracts Act of 1965, 41 U.S.C. 351.

If Constitutional Immunity From Taxation Includes Immunity From Special Assessment, It Is Waived As A Tax On Real Estate Under 12 U.S.C. Sec. 531.

The Eighth Circuit Court of Appeals held that a special assessment is not a tax on real estate under 12 U.S.C. Sec. 531 and thus Congress had not waived the constitutional immunity from special assessment. The intermediate appellate court erroneously assumed (1) that constitutional immunity from taxation extends to local assessments on real estate, and (2) that the express waiver of immunity from real estate taxes in 12 U.S.C. Sec. 531 does not include assessments on real estate. The opinion of the Eighth Circuit is internally inconsistent. If an assessment on real estate is a "tax" for purposes of constitutional immunity from taxation, that assessment is a "tax" on real estate which "tax" is waived under 12 U.S.C. Sec. 531. The holding of the Eighth Circuit Court of Appeals perpetuates the inconsistent position of the Federal Reserve Bank that the assessment on real estate is an unconstitutional "tax" on the one hand and not a "tax" on real estate on the other. Moreover, the decision enlarges the scope of constitutional immunity without examining the applicable constitutional underpinnings.

In view of the widespread use of improvement districts to rescue central urban areas from blight and decay, the large number of property-owning federal agencies and instrumentalities in the urban areas for which improvement is sought, a resolution of the questions presented will have a substantial economic impact throughout the cities of the United States.

Briefs on the merits and oral argument should be allowed.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 80-1649

Federal Reserve Bank of St. Louis, a United States Corporation,	*	
Appellant,	*	Appeal from the United States District Court
v.	*	for the Eastern District of Arkansas
Metrocentre Improvement District No. 1, City of Little Rock, Arkansas,	*	
Appellee.	*	

Submitted: April 15, 1981
Filed: August 11, 1981

Before HEANEY, STEPHENSON and McMILLIAN, Circuit Judges.

STEPHENSON, Circuit Judge.

The city of Little Rock, Arkansas, formed the Metrocentre Improvement District No. 1 (District) which is a Central Business Improvement District for downtown Little Rock. The Federal Reserve Bank of St. Louis (Bank)

holds title to lots 1 - 10 of Block 94 in Little Rock, all of which are located within the Improvement District. The District assessed the Bank an annual fee of $12,854 payable from 1977 through 2002 inclusive. The Bank refused to pay the special assessment and filed suit seeking (1) a declaratory judgment that it is exempt from such assessments; (2) an order directing that defendant remove any existing assessments against the Bank; and (3) an injunction restraining Metrocentre from making further assessments and from instituting any legal action to recover past assessments. The district court [1] found first, that the Bank was not exempt because the Bank was not an agency or instrumentality of the federal government for the purpose of the special assessment. Second, it held that the exemption from taxes granted the Bank by 12 U.S.C. §531 does not relieve the Bank from paying special assessments. *Federal Reserve Bank v. Metrocentre Improvement District*, 492 F. Supp. 353, 359 (E.D. Ark. 1980). We reverse the district court.

The first question we must face is whether the district court erred in finding the Bank is not an agency or instrumentality of the federal government for purposes of tax immunity. It is a well-established doctrine that federal agencies or instrumentalities are immune from special assessments by state and local governments. *United States v. City of Adair*, 539 F.2d 1185, 1188 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *Board of Directors v. Reconstruction Finance Corp.*, 170 F.2d 430, 431 (8th Cir. 1948). *See McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 425-35 (1819). Therefore, if the Bank can be construed as such an entity, its immunity from the assessment in the present case is established.

It has long been recognized that a governmental instrumentality is one that performs an important

[1] The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

governmental function. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941); *Federal Land Bank v. Priddy*, 295 U.S. 229, 231 (1935); *Rust v. Johnson*, 597 F.2d 174, 178 (9th Cir.), *cert. denied*, 444 U.S. 1044 (1979). [2]

Appellant argues that federal reserve banks perform such functions. In spite of their independent status, they conduct important governmental functions regarding the issuance of currency, general fiscal duties of the United States, and, in general, regulate the financial structure,

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[2]Appellees argue that the test recognized in Federal Tort Claims Act cases should be applied here. That test is based on whether the federal government dictates the "detailed physical performance" of the corporation. *United States v. Orleans*, 425 U.S. 807, 814 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973). However, because of other policy considerations, the test is different when determining whether an entity is an agency or instrumentality for purposes of the F.T.C.A. than for purposes of taxation. *Federal Land Bank v. Priddy*, 295 U.S. 229, 235 (1935). Therefore we hold the F.T.C.A. test is not dispositive.

Appellees also argue that the Bank is not an instrumentality under the test of *United States v. Boyd*, 378 U.S. 39, 48 (1964), which states that the corporation must have become "so incorporated into the government structure as to become [an] instrumenalit[y] of the United States * * *" in order to enjoy governmental immunity. They argue that because of the Bank's independence, it cannot be deemed to be an instrumentality. We disagree. The Bank is performing such an important governmental function that in spite of great independence it must still be considered to be an instrumentality of the federal government.

either directly or indirectly, of both federal and state banks.[3]

Many types of federally chartered financial institutions, whose link to the federal government is more attenuated than the federal reserve banks, have been held to be instrumentalities of the federal government. These institutions include national banks, *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 340-43 (1968); *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 668 (1899); national farm loan associations, *Knox National Farm Loan Assn. v. Phillips*, 300 U.S. 194, 202 (1937); and federal land banks, *Federal Land Bank v. Bismarck Lumber Co., supra*, 314 U.S. at 102; *Federal Land Bank v. Priddy, supra*, 295 U.S. at 231.

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[3]Some of the powers of the federal reserve bank include the following:

(a) It can create new currency, by issuing its own notes. 12 U.S.C. §392;

(b) It can establish discount and advance rates to be charged to depository institutions having transaction accounts or nonpersonal time deposits, and it can make advances and loans to institutions. 12 U.S.C. §347(a), 357;

(c) It acts as fiscal agent of the United States. 12 U.S.C. §391;

(d) It performs services formerly performed by the Assistant Treasurer of the United States. 12 U.S.C. §§476, 478;

(e) It participates in open market activities as directed by the Federal Open Market Committee. 12 U.S.C. §263;

(f) It examines state chartered banks which are members of the Federal Reserve System. 12 U.S.C. §325;

(g) It performs certain other delegated functions at the direction of the Board of Governors. 12 C.F.R. §265, 2(f).

In light of the important governmental functions performed by the federal reserve banks and the United States Supreme Court's willingness to hold that financial institutions performing even fewer governmental functions are federal instrumentalities, we hold that the federal reserve banks are instrumentalities of the federal government. Our holding is consistent with other circuits that have faced this question. *Federal Reserve Bank v. City of Memphis*, No. 79-2024 (W.D. Tenn., filed Sept. 24, 1979), *aff'd*, 649 F.2d 462 (6th Cir. 1981); *Federal Reserve Bank v. Kalin*, 77 F.2d 50, 51 (4th Cir. 1935); *Raichle v. Federal Reserve Bank*, 34 F.2d 910, 916 (2d Cir. 1929).

More important, in 12 U.S.C. §531, Congress specifically provided that federal reserve banks enjoy immunity from state and local taxation except taxes upon real estate. The statute provides:

> Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom, shall be exempt from Federal, State and local taxation, except taxes upon real estate.

Id.

This brings us to the second issue in the case; whether the special assessment qualifies as a real estate tax under 12 U.S.C. §531. If it does, then even though the bank is exempt as an instrumentality, Congress may have subjected the bank to the tax by specifically waiving the exemption.

We have held that where there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption. *United States v. City of Adair, supra*, 539 F.2d at 1189. Furthermore, where a statute waives the exemption for "real estate taxes," that waiver alone will not extend to special assessments. *Illinois Central R.R. v. Decatur*, 147 U.S. 190, 198-209 (1893); *United States v. City of Adair, supra*, 539

F.2d at 1189; *Board of Directors v. Reconstruction Finance Corp., supra*, 170 F.2d at 431.

In the *Adair* case, we held that the property of the Commodity Credit Corporation was immune from a special assessment levied by the city of Adair, Iowa, against real property of the C.C.C. The C.C.C. was found to be a federal instrumentality and that it was exempt from local taxation even though there was a statute similar to 12 U.S.C. §531 waiving the exemption for real estate taxes. *United States v. City of Adair, supra*, 539 F.2d at 1189-90. In light of the similarities in the cases, we are persuaded that the holding in the *Adair* case is controlling in the instant case.

In conclusion, we hold that the federal reserve bank is a federal instrumentality and therefore injoys an immunity from state and local taxation unless waived by Congress. [4] We further hold that the waiver of immunity from real estate taxes under 12 U.S.C. §531 does not extend to special assessments.

Reversed and remanded for further proceedings consistent herewith.

A true copy.

Attest:

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[4]Since congressional waiver of immunity is required, the failure of the Bank to timely contest the assessment does not affect the result. *See Department of Employment v. United States*, 385 U.S. 355, 359 (1966); *Reconstruction Finance Corp. v. Texas*, 229 F.2d 9, 11 (5th Cir. 1956).

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
(Filed June 23, 1980)

FEDERAL RESERVE BANK
OF ST. LOUIS

v. No. LR-C-77-100

METROCENTRE IMPROVEMENT DISTRICT
No. 1, CITY OF LITTLE ROCK,
ARKANSAS

MEMORANDUM OPINION

The City of Little Rock, Arkansas, formed the Metrocentre Improvement District No. 1, a Central Business Improvement District for downtown Little Rock, pursuant to *Ark. Stat. Ann.* §§20-1601—1634 (Repl. 1968) and Ordinance 12,869 of the City of Little Rock, adopted October 16, 1973. The Federal Reserve Bank of St. Louis (FRBSL) holds title to Lots 1—10 of Block 94 in Little Rock, all of which is located within the Improvement District. As a result of the formation of this District, the FRBSL was assessed an annual fee of $12,854.00, payable from 1977 through 2002, inclusive. The FRBSL has refused to pay the assessment and filed suit seeking a declaratory judgment that it is exempt from such assessments, for an injunction to restrain the defendant Metrocentre from making further assessments and from instituting any legal action to recover any assessments owed and for an order directing that defendant remove any existing assessments against the FRBSL's property.

Plaintiff contends that, as an agency or instrumentality of the United States government, and because of its exemption from all but real estate taxes granted by 12 U.S.C. §531, the assessments are invalid because of being,

respectively, violative of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and because to allow such an assessment would be contrary to the clear intent of Congress.

Defendant contends that the FRBSL is not an agency or instrumentality of the government for the purposes of the assessment and that such assessments are not "taxes" from which the FRBSL is exempt. Defendant also asserts that the FRBSL has not complied with *Ark. Stat. Ann.* §20-416 (Repl. 1968) which requires that any contest of the validity of an assessment of this type must be made within thirty days of the publication of the ordinance. Plaintiff has admitted that it did not comply with §20-416, and the record so reflects.

Since the immunity of an agency or instrumentality of the federal government can be waived only specifically by Congress, *Bd. of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark. v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948), the primary question which this Court must address is whether the FRBSL is an agency or instrumentality of the government.

First, it must be noted that the FRBSL has been anything but consistent on that point. The FRBSL takes whatever position on its status as a governmental agency or instrumentality as appears expedient in a given situation. (Russell deposition, pp. 58, 94, 95, 101). Mr. Lawrence K. Roos, the president and chief executive officer of the FRBSL, stated in his deposition that the FRBSL has taken varying positions on this question depending on the "advantages or disadvantages for us." (Roos deposition, p. 9).

In establishing the Federal Reserve System, Congress provided for a two-part structure: (1) a system of independent regional institutions, owned by commercial banks in the region and locally controlled, *i.e.*, the Reserve

Banks; and (2) the Federal Reserve Board, a government-controlled entity to perform the function of a central bank and to provide general supervision over the Reserve Banks. The legislative history of the Federal Reserve Act demonstrates that Congress intended the regional Reserve Banks (such as the FRBSL) to be non-governmental entities, separate and distinct from the United States, owned by the commercial banks in the respective regions and designed to function essentially for private purposes, *i.e.*, to collect checks, 12 U.S.C. §§248 (o), 342, 360; to discount notes of member banks, 12 U.S.C. §§343, 344, 346, 348, 349, 352, 357; to make advances to member banks, 12 U.S.C. §§347–347c; to hold reserves for member banks, 12 U.S.C. §461; and to purchase and sell securities on the open market, 12 U.S.C. §§353, 355, 359.

The legislative history of the Federal Reserve Act, which Act created the Board and the Reserve Banks, clearly indicates that there was to be a distinction between the regional Reserve Banks and the government itself. The House Report on the bill that became the Federal Reserve Act described the intended structure and function of the Reserve Banks as follows:

> It [the Committee] recommends that these bankers' banks shall be given a definite capital, to be subscribed and paid by their constituent member banks which hold their shares, and that they shall do business only with the banks aforesaid *and with the Government.* H. R. Report No. 69, 63d Cong., 1st Sess. 16 (1913) [Hereafter "House Report"] (emphasis supplied).

The primary function of these Reserve Banks, according to the House Report, was to provide services for the commercial banks which own their stock. The Reserve Banks would be regulated by the federal government, as are the national commercial banks, but were not part of the government:

> The Federal reserve banks . . . would be in effect cooperative institutions, carried on for the benefit of the community and of the banks themselves by the banks acting as stockholders therein . . . The committee, however, recommends that they shall be individually organized and individually controlled, each holding the fluid funds of the region in which it is organized and each ordinarily dependent upon no other part of the country for assistance. *The only factor of centralization which has been provided in the committee's plan is found in the Federal reserve board, which is to be a strictly Government organization created for the purpose of inspecting existing banking institutions and of regulating relationships between them and the Government itself.* House Report 17-18 (emphasis supplied).

The similarity of national bank and Reserve Bank powers is evident in a comparison of 12 U.S.C. §24 with 12 U.S.C. §341. See *Lucas v. Federal Reserve Bank of Richmond*, 59 F.2d 617 (4th Cir. 1932). Furthermore, it is evident that Congress did not intend the federal government to have the power to direct the day-to-day operations of the Federal Reserve Banks:

> It is proposed that the Government shall retain a sufficient power over the reserve banks to enable it to exercise a directing authority when necessary to do so, but that it shall in no way attempt to carry on through its own mechanism the routine operations and banking which require detailed knowledge of local and individual credit and which determine the actual use of the funds of the community in any given instance. In other words, the reserve-bank plan retains to the Government power over the exercise of the broader banking functions, while it leaves to individuals and privately owned institutions the actual direction of routine.
> House Report 18-19.

Congress structured the Reserve Banks as corporate entities, owned by commercial banks, "under the [direction and] supervision and control" of their own boards of directors and subject only to "general supervision" by the Federal Reserve Board. 12 U.S.C. §§301, 248 (j).

Using the Federal Tort Claims Act (FTCA) as an example, the FRBSL lacks the indicia of close relationships with the United States that have traditionally led the courts to find agency status for other entities.

The test for determining whether an entity is a federal agency and whether its employees are "employees of the government" for purposes of the FTCA is whether the federal government has the power "to control the detailed physical performance" of the day-to-day operations of that entity. *United States v. Orleans*, 425 U.S. 807, 814 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973). Other factors which have been considered illustrative in determination of federal agency status are the entity's independent corporate status, *Pearl v. United States*, 230 F.2d 243 (10th Cir. 1956); *Wickman v. Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn. 1948); the entity's purpose and function, *Pearl v. United States, supra; Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 910 (1961); and federal involvement in the entity's finances, *Goddard v. District of Columbia Redevelopment Land Agency, supra; Freeling v. Federal Deposit Insurance Corp.*, 221 F. Supp. 955 (W.D. Okl. 1962), *aff'd per curiam*, 326 F.2d 971 (10th Cir. 1963); *Handley v. Tecon Corp.*, 172 F. Supp. 565 (N.D.N.Y. 1959).

Each Reserve Bank is a "separate body corporate," all of the stock of which is owned, not by the United States, but by the private commercial banks within the Reserve Bank's district that are members of the Federal Reserve System. 12 U.S.C. §§341, 282, 323; Roos deposition, pp. 4-5. Each

Reserve Bank is under the supervision and control of its board of directors. 12 U.S.C. §301. Two-thirds of the nine-member board of directors of each Reserve Bank are chosen by the stock-holding commercial banks. 12 U.S.C. §§302, 304. The remaining three directors are appointed by the Board; but these directors are not employees of the Board or of the United States. 12 U.S.C. §§302, 305. The board of directors of each Reserve Bank is empowered to prescribe by-laws regulating the business of the bank and to exercise all powers conferred by statute and incidental powers. 12 U.S.C. §341. In addition, the Reserve Banks are authorized to appoint their officials and hire their own employees. The real property held by, and the buildings occupied by, the Reserve Banks are owned by the various Reserve Banks, not by the Board or the United States. (Breen deposition, p. 27). Each Reserve Bank may sue and be sued in its own name in any court of law or equity. 12 U.S.C. §341. Claims based on the alleged negligence of Reserve Bank employees have been processed by the Reserve Banks themselves, and lawsuits based on such claims have traditionally been brought against the Reserve Banks. Cf. *Huntington Towers, Ltd. v. Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *Kalopodes v. Federal Reserve Bank of Richmond*, 367 F.2d 47 (4th Cir. 1966); *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438 (2d Cir. 1948).

The employees of the FRBSL do not participate in the Civil Service Retirement system (Britt deposition, p. 43); while traveling on FRBSL business, the employees are not subject to federal travel regulations (Britt deposition, p. 38); they do not typically receive a government employee discount when procuring lodging and services (Britt deposition, p. 39); FRBSL employees are covered by workmen's compensation insurance purchased by the FRBSL rather than by the Federal Employees Compensation Act which covers most civilian federal employees (Britt deposition, p. 17).

The FRBSL carries its own liability insurance (Britt deposition, p. 18), and pays real estate taxes on its holdings (Britt deposition, p. 19; 12 U.S.C. §531); and, despite its assertion that, as a government agency, it is exempt from all "fees" or "assessments," it pays state licensing and motor vehicle fees on the vehicles it owns (Britt deposition, p. 40). The FRBSL's correspondence is not mailed in government envelopes (Britt deposition, p. 43); litigation involving the FRBSL is handled through private counsel, rather than government attorneys, when outside assistance is needed (Britt deposition, p. 37).

Further, the Board has the authority to exercise general supervision over the Reserve Banks, such as the FRBSL, 12 U.S.C. §248(j), like that of the federal supervisory agencies over commercial banks. For example, under the Bank Protection Act of 1968, 12 U.S.C. §§1881–1884, the Federal Reserve Board is the federal supervisory authority with respect to Federal Reserve and state member banks.

The Reserve Banks were established to function, and do function, primarily to serve the business and financial community and the member banks which hold all the stock. As the House Report regarding the original Federal Reserve legislation stated:

> The Federal reserve banks suggested by the committee as just indicated would be in effect cooperative institutions, carried on for the benefit of the community and of the banks themselves by the banks acting as stockholders therein.
> H.R. Rep. No. 69, 63d Cong., 1st Sess.

As privately owned corporations, the Reserve Banks receive no appropriated funds from Congress. The Reserve Banks derive their funds from their holdings of securities and interest received from credit extended to member banks. Each Reserve Bank pays its stockholding member

banks a statutory dividend of six per cent (after provisions for the expenses of the respective Reserve Bank). 12 U.S.C. §289. The remaining earnings are then paid into the Reserve Bank's surplus account. *Id.*

The legislative framework designed by Congress, as described *supra*, demonstrates that the Reserve Banks are essentially "bankers' banks," private in character, conducted under the supervision of a board of directors (12 U.S.C. §301), are not federal agencies and do not act primarily as instrumentalities of the United States.

Based on statutory construction, function and legislative purpose, the Reserve Banks have generally been considered to be independent of the federal government. In short, the FRBSL's status as an agency or instrumentality of the federal government is, at most, tangential. It is an independent, United States corporation.

Therefore, referring back to the question of whether the FRBSL could have waived its objections to the assessment by Metrocentre, by virtue of its failure to comply with *Ark. Stat. Ann.* §20-416 (Repl. 1968), it is apparent that the FRBSL, not being an instrumentality of the government, may, by not meeting the limitation requirement of that statute, waive its right to contest the assessment even absent the consent of Congress. The FRBSL's failure to contest the assessment at the appropriate time operated as a waiver of its right to object. The FRBSL was aware of the nature and purpose of the proposed Metrocentre Improvement District and, presumably, the ramifications thereof, *i.e.*, that it would be assessed. The FRBSL even expressed its support for the formation of the improvement district in a resolution by its board of directors (Exhibit to Joint Stipulation). It certainly declined to act to avoid the assessment with knowledge that it was to be assessed and thereby knowingly failed to comply with the limits imposed by §20-416.

Nonetheless, even if the FRBSL had acted within the time allotted by §20-416, it would still not be immune from the assessment based on its exemption granted in 12 U.S.C. §531.

In *Bd. of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark. v. Reconstruction Finance Corp., supra* ("Red River"), the Eighth Circuit held that an "assessment" for benefits conferred by an improvement district similar to Metrocentre was not "taxation" under the Reconstruction Finance Corporation Act that subjected real property to local "taxation." That court, relying in the United States Supreme Court case of *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946), stated that a term in the Act such as "taxation" which was not defined must be determined by state law. Applying Arkansas law, another United States Supreme Court case and a noted treatise, the Eighth Circuit held that an assessment for an improvement is not a tax. The Court stated:

> Thus it is manifest that an assessment to procure funds to pay for a local improvement is a contribution exacted from the owner of property within the improvement district for benefits resulting from the particular improvement, no matter how measured, and not a tax within the meaning of that term as used in Federal statutes. 170 F.2d at 433.

In *Red River, supra*, the defendant Reconstruction Finance Corporation was, without question, an instrumentality of the federal government, and the Eighth Circuit held that such assessments could not be made without the consent of Congress, saying:

> It is familiar law that a State has no power to tax the property of the United States or any of its instrumentalities within its limits without the

> consent of Congress whether such tax be strictly for state purposes or for local and special projects. 170 F.2d at 431.

Since the FRBSL is not an instrumentality of the federal government, this "familiar law" is not applicable.

Further, despite the holding of the Court in *Red River, supra*, the opinion reads more like an argument in favor of the levying of the assessment against even an instrumentality of the government:

> The Supreme Court of the United States discussed the distinction [between taxes and special assessments] at length in *Illinois Central Railway v. Decatur*, 147 U.S. 190, 13 S.Ct. 293, 37 L.Ed. 132, where it was held that an exemption of the railroad company from taxation is to be construed as an exemption from the burden of ordinary taxes and not from special assessments for a local improvement. The Court concluded: "And whether the charges are called 'special taxes' or 'special assessments,' and by whatever tribunal or by whatever mode the question of benefits may be determined, the fact remains that the charges are for a local improvement, and cast upon the contiguous property, upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge. The charges here are not taxes proper, are not contributions to the state or to the city for the purpose of enabling either to carry on its general administration of affairs, but are charges only, and specially, for the cost for a local improvement supposed to have resulted in an enhancement of the value of the railroad company's property. It is not in lieu of such charges that the company pays annually the stipulated per cent of its gross revenues into the state treasury. Id. at 432, 433.

The distinction, therefore, which the defendant Metrocentre would make between taxes and assessments such as the assessment herein is well made. The Supreme Court of the United States in *Illinois Central v. Decatur.* 147 U.S. 190, 196 (1893), viewed the distinction as being of controlling importance. The Court stated:

> Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sums they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made; and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application cannot

demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice.

The Federal Reserve Bank of St. Louis is not an agency or instrumentality of the federal government for the purpose of the special assessment imposed by the Metrocentre Improvement District No. 1, and the exemption from taxes granted the FRBSL by 12 U.S.C. §531 " . . . is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments." 147 U.S. at 199.

/s/ Elsijane T. Roy
United States District Judge

DATE: June 23, 1980

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
(Filed Sept. 8, 1981)

No. 80-1649 September Term, 1980

Federal Reserve Bank of St. Louis, etc.,
Appellant,

vs.

Metrocentre Improvement District #1, etc.

Appellee.

Appeal from United States District Court for the Eastern District of Arkansas

This cause was heard on a designated record from the United States District Court for the Eastern District of

Arkansas and on briefs of the respective parties and was argued by counsel.

After consideration, it is now ordered and adjudged that the judgment of the District Court in this cause be, and the same is hereby reversed in accordance with the opinion of this Court.

It is further ordered that cause be remanded to said District Court for further proceedings consistent with the opinion of this Court.

August 11, 1981

Costs taxed in favor of Appellant:

Clerk's docketing fee:	$ 65.00
Costs of reproducing 5 copies of main brief and reply brief:	$ 21.50
Total costs of Appellant for recovery from Appellee:	$ 86.50

(PLEASE PAY COSTS DIRECTLY TO PARTIES INVOLVED)

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit
9/4/81

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
(Filed Oct. 9, 1981)

FEDERAL RESERVE BANK
OF ST. LOUIS — APPELLANT

VS. — NO. 80-1649

METROCENTRE IMPROVEMENT
DISTRICT NO. 1, CITY OF
LITTLE ROCK, ARKANSAS — APPELLEE

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Metrocentre Improvement District No. 1, the above named appellee, appeals to the Supreme Court of the United States from the judgment of the Eighth Circuit Court of Appeals reversing the United States District Court, entered in this action on August 11, 1981.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas, 72201
(501) 371-0808

BY: /s/ Gus B. Walton, Jr.
Gus B. Walton, Jr.

CERTIFICATE OF SERVICE

On this 7th day of October, 1981, a copy of the foregoing notice of appeal was mailed to Mr. W. S. Miller, Jr., Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A., Suite 600, Tower Building, Little Rock, Arkanas, and to Ms. Joan P. Cronin, Assistant General Counsel, Federal Reserve Bank of St. Louis, P. O. Box 442, St. Louis, Missouri, 63166.

/s/ Gus B. Walton, Jr.

Gus B. Walton, Jr.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-865

IN THE

Supreme Court Of The United States

October Term 1981

METROCENTRE IMPROVEMENT DISTRICT NO.1
CITY OF LITTLE ROCK, ARKANSAS .....APPELLANT

V.

FEDERAL RESERVE BANK OF ST. LOUIS .....APPELLEE

On Appeal from the
United States Court of Appeals
for the Eighth Circuit

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

Table of Authorities 1, 2

Motion to Dismiss or Affirm 3

TABLE OF AUTHORITIES

Cases Pages

Board of Directors of Red River Levee District No. 1 of Lafayette County, Arkansas v. Reconstruction Finance Corporation, 170 F. 2d 430 (8th Cir. 1948) 7

Board of Improvement v. School District of Little Rock, 56 Ark. 424, 19 S.W. 969 (1892) 5

City of Atlanta v. Presbyterian Church, 13 S.E. 252 (Ga. 1891) 5

City of Detroit v. Murray Corp., 355 U.S. 48, 78 S.Ct. 458 (1958) 4

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 62 S.Ct. 1 (1941) 6

Federal Land Bank v. Priddy, 295 U.S. 229, 55 S.Ct. 705 (1935) 6

Federal Reserve Bank of Boston v. Commissioner of C & T, 499 F.2d 60 (1st Cir. 1974) 6

Federal Reserve Bank of Richmond v. Kalin, 77 F.2d 50, (4th Cir. 1935) 6

Federal Reserve Bank of St. Louis v. City of Memphis, No. 79-2024 (W.D. Tenn., filed Sept. 24, 1979), affirmed 649 F.2d 462 (6th Cir. 1981) 6

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 88 S.Ct. 2173 (1968) 6

Knox National Farm Loan Assn. v. Phillips, 300 U.S. 194, 57 S.Ct. 418 (1937) 6

Owensboro National Bank v. Owensboro, 173 U.S. 664, 19 S.Ct. 537 (1899) 6

Raichle v. Federal Reserve Bank of New York, 34 F.2d 910 (2d Cir. 1929) 6

Swords v. Nutt, 11 F.2d 936 (9th Cir. 1926) 7

United States v. City of Adair, 539 F.2d 1185 (8th Cir. 1976) cert. denied 429 U.S. 1121, 97 S.Ct. 1157 (1977) 7

Statutes

12 U.S.C. §290 8

12 U.S.C. §548 7

28 U.S.C. §1254(2) 3, 4

No. 81-865

IN THE

Supreme Court Of The United States

October Term 1981

METROCENTRE IMPROVEMENT DISTRICT NO.1
CITY OF LITTLE ROCK, ARKANSAS .....APPELLANT

V.

FEDERAL RESERVE BANK OF ST. LOUIS .....APPELLEE

On Appeal from the
United States Court of Appeals
for the Eighth Circuit

MOTION TO DISMISS OR AFFIRM

Appellee, Federal Reserve Bank of St. Louis, respectfully moves that the Court dismiss this appeal on the ground that it is not in conformity with 28 U.S.C. §1254(2). In the alternative, Appellee moves that the Court affirm the decision of the Court of Appeals for the Eighth Circuit because it is manifest that the federal questions presented are so unsubstantial as not to need further argument.

I

THIS COURT LACKS JURISDICTION BECAUSE THE COURT OF APPEALS DID NOT FIND THE ARKANSAS STATUTE TO BE INVALID AS REPUGNANT TO THE CONSTITUTION, TREATIES, OR LAWS OF THE UNITED STATES.

28 U.S.C. § 1254(2) provides that decisions of the Court of Appeals may be reviewed by appeal only when a state statute has been held invalid. There is nothing in the decision of the Court of Appeals which holds any state statute invalid. Appellant outlines the holding of the Court of Appeals on page 10 of its brief. Of the four holdings listed, the first three consist entirely of interpretations of the Constitution and statutes of the United States; only the last suggests any connection with state law. The Court of Appeals states in footnote 4 of the Opinion:

> "Since congressional waiver of immunity is required, the failure of the Bank to timely contest the assessment does not affect the result."

In this statement, Appellant apparently seeks to find an implied invalidation of the Arkansas statutes which establish and regulate municipal improvement districts. Appellant's contention requires the assumption that the Arkansas statutes sought to impose burdens on the United States and its instrumentalities.

In construing state tax statutes, this Court has held that:

> "we are concerned only with its practical operation, not its definition or the precise form of descriptive words that may be applied to it . . . Consequently, in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance . . . as applied and of course that is the way they must be judged. . . ."

City of Detroit v. Murray Corp., 355 U.S. 48, 78 S.Ct. 458 (1958).

There is nothing in the wording of any of the Arkansas statutes cited by Appellant which seeks to apply them to instrumentalities of the United States. There is nothing to indicate that the authorities of Arkansas who administer the statutes have ever sought to burden the United States or its instrumentalities. Indeed, in both the District Court and the Court of Appeals, Appellant argued that the Federal Reserve Bank is not an instrumentality of the United States, demonstrating that it did not believe that the Arkansas statutes applied to an instrumentality of the United States.

In *Board of Improvement v. School District of Little Rock*, 56 Ark. 424, 19 S.W. 969 (1892), the Supreme Court of Arkansas, in dealing with a case where an assessment statute contained no language specifically exempting public property, quoted with approval:

> "That the public property of the United States, the state, the county or the city was intended to be dealt with thus is so improbable that we have no hesitation in holding an implied exemption should be engrafted upon the act by construction . . . ." *City of Atlanta v. Presbyterian Church*, 13 S.E. 252 (Ga. 1891).

The Supreme Court of Arkansas then found that an exception for public property was properly implied in the statute providing for assessment for local improvements. Applying this precedent, the Arkansas statutes upon which Appellant relies should be properly construed to contain an implied exemption for instrumentalities of the United States, and are no way repugnant to the Constitution or laws of the United States.

II

IN THE EVENT THIS APPEAL IS NOT DISMISSED, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE APPEAL RAISES NO FEDERAL QUESTIONS WHICH WARRANT FURTHER CONSIDERATION BY THIS COURT.

The principal issue in the Court of Appeals was whether Federal Reserve Banks are, as a matter of law, instrumentalities of the United States. The Court of Appeals held that they were, after reviewing the statutory functions of Reserve Banks and the most commonly accepted and logical test of whether an organization is performing a governmental function. In reaching this conclusion, the Eighth Circuit noted that many types of financial institutions whose link with the Federal government is more attenuated than that of Reserve Banks have been held by this Court to be instrumentalities of the United States, such as national banks, *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 340-43, 88 S.Ct. 2173 (1968) and *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 668, 19 S.Ct. 537 (1899); national farm loan associations, *Knox National Farm Loan Assn. v. Phillips*, 300 U.S. 194, 202, 57 S.Ct. 418 (1937); and federal land banks, *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102, 62 S.Ct. 1 (1941) and *Federal Land Bank v. Priddy*, 295 U.S. 229, 231, 55 S.Ct. 705 (1935). This conclusion of the Eighth Circuit is consistent with that of every other Court of Appeals which has considered this question, *Federal Reserve Bank of Boston v. Commissioner of C & T*, 499 F.2d 60 (1st Cir. 1974); *Federal Reserve Bank of St. Louis v. City of Memphis*, No. 79-2024 (W.D. Tenn., filed September 24, 1979), affirmed 649 F.2d 462 (6th Cir. 1981); *Federal Reserve Bank of Richmond v. Kalin*, 77 F.2d 50, 51 (4th Cir. 1935); *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910, 916 (2d Cir. 1929).

The second issue on appeal was whether an instrumentality of the United States is constitutionally immune from real property assessments by states and their subdivisions. The Court of Appeals held that it was, and that immunity could only be waived by clear and express congressional action, noting that these issues were previously addressed by the Eighth Circuit in *United States v. City of Adair*, 539 F.2d 1185, 1188 (1976) cer. denied, 429 U.S. 1121, 97 S.Ct. 1157 (1977) and *Board of Directors of Red River Levee District No. 1 of Lafayette County, Arkansas v. Reconstruction Finance Corporation*, 170 F.2d 430, 431 (1948).

The remaining issues raised by Appellant are so unsubstantial as not to warrant consideration in this Court. All are thoroughly discussed and the precedents reviewed in the Opinion of the Court of Appeals. The only case which Appellant presents which was not discussed in the Court of Appeals is *Swords v. Nutt*, 11 F.2d 936 (9th Cir. 1926). In that case, the receiver of a liquidating national bank sought to set aside the special assessment of an improvement district on the grounds that it was not within the scope of the Congressional waiver of immunity from real estate taxes set out in Section 5129 of the statutes regulating national banks (12 U.S.C. § 548). The case turned, not on a constitutional question, but upon the Ninth Circuit's interpretation of that section of the statutes giving national banks the power to hold real estate.

> "Nothing is found in the national legislation on the subject to justify the conclusion that Congress, in granting to national banks authority to own real estate, intended to absolve such property from the burdens imposed by state authority upon like lands within its domain . . . ." p. 937

The Court thus found an implied waiver of immunity from assessment in the grant of the power to own real estate.

> "The power conferred upon national banks to own real estate is not a mere power to hold legal title thereof until the property is disposed of. It is a power to hold with the usual incidents of ownership." p. 937

The power of national banks to own real estate is not an issue in this case. In addition, the analysis of the incidents of ownership set forth above is not supportive of Appellant's cause because Section 7 of the Federal Reserve Act (12 U.S.C. §290) specifically provides that upon liquidation of a Federal Reserve Bank, the remaining assets become the property of the United States.

Wherefore, Appellee moves to dismiss this appeal, or in the alternative, to affirm the decision of the United States Court of Appeals for the Eighth Circuit.

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Appellant's Reply Brief

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No. 81-865

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

Metrocentre Improvement District No. 1,
City of Little Rock, Arkansas ..... *Appellant*

V.

Federal Reserve Bank of St. Louis ..... *Appellee*

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

Appellate Jurisdiction Is Proper 1

The Questions Presented Are Substantial 3

TABLE OF AUTHORITIES

Page

Cases

City of Detroit v. Murray Corp., 355 U.S. 489 (1958) 2

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 3, 4

National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869) 3, 4

Swords v. Nutt, 11 F.2d 936 (9th Cir. 1926) 3

Statutes-Federal

28 U.S.C. Sec. 1254(2) 1, 2

United States Constitution

U.S. Const. art. VI, cl. 2 3

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I.

APPELLATE JURISDICTION IS PROPER

Appellant, Metrocentre Improvement District No. 1, City of Little Rock, Arkansas ("District") invokes the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. Sec. 1254 (2) which allows cases in the courts of appeal to be reviewed by the Supreme Court as follows:

> (2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, ...

In *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958) a contractor sued the City of Detroit to recover ad valorem personalty taxes paid by him. The United States intervened, claiming title to the property assessed by virtue of a contract clause which provided that title to all parts, materials and inventories produced by the contractor vested in the United States upon its making a partial payment under the contract. The contractor argued that the tax was on property of the United States and not a privilege tax against the taxpayer. The District Court entered summary judgment in favor of the contractor on the grounds that the taxation infringed on the Federal Government's constitutional immunity. The city appealed to the Sixth Circuit Court of Appeals which affirmed the trial court. An appeal was taken to the United States Supreme Court pursuant to 28 U.S.C. Sec. 1254 (2). The Court found that the appeal was proper.

Like the appellant in *Murray*, the District appeals from a holding that its right to assess for benefits conferred infringes upon the Government's constitutional immunity from taxation. In both cases a state statute was held unconstitutional as applied to the particular taxpayer.

Under 28 U.S.C. Sec. 1254 (2) a state statute does not have to be held unconstitutional on its face; the jurisdiction of the court is proper where a state statute is held unconstitutional as applied to a particular person. The power of the District to assess the Federal Reserve Bank of St. Louis for benefits conferred to its property has been invalidated by the Eighth Circuit Court of Appeals. The appeal is proper under 28 U.S.C. Sec. 1254 (2).

The Federal Reserve Bank of St. Louis argues that a state statute has not been held invalid as repugnant to the Constitution under 28 U.S.C. Sec. 1254 (2) because the bank's immunity is based upon an implied exemption under state law. This assertion was never considered by the District Court or the Eighth Circuit Court of Appeals. The

only basis for immunity briefed by the parties throughout the litigation centered on the Supremacy Clause of the United States Constitution, art. VI, cl. 2. The District's right under state statutes to assess the Federal Reserve Bank of St. Louis for benefits conferred to its property has been held by the court of appeals to be invalid as repugnant to the Supremacy Clause of the Constitution of the United States, and jurisdiction is proper under 28 U.S.C. Sec. 1254 (2).

II.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) is a landmark decision in the area of federalism. It held that the State of Maryland could not impose a tax on the operations of the branch Bank of the United States located in the State of Maryland. Justice Marshall treated the several states with equal dignity in the opinion. He stated that neither sovereign power had the right to tax the operations of the other. An assessment for benefits conferred to the real property owned by the Federal Reserve Bank of St. Louis does not infringe upon the power of the United States to perform any governmental functions. No concept of federalism supports the extension of constitutional immunity in the area of special assessment.

In *Swords v. Nutt*, 11 F.2d 936 (9th Cir. 1926) the Ninth Circuit Court of Appeals held that a national bank was not immune from special assessment. The court discussed the doctrine of constitutional immunity and quoted *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869) as follows:

> [T]he doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes

> in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation.

Id. at 937, quoting *National Bank, supra*, at 361. The Ninth Circuit Court of Appeals did not use the doctrine of constitutional immunity from taxation to insulate the national bank from special assessment. The real property owned by the bank was subject to the assessment. This approach is consistent with *M'Culloch*, where Justice Marshall stated as follows:

> This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, . . .

M'Cullock, supra at 436.

The Federal Reserve Bank of St. Louis is not constitutionally immune from an assessment for benefits conferred to its real property. Briefs on the merit should be allowed.

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No. 81-865

In the Supreme Court of the United States

OCTOBER TERM, 1981

METROCENTRE IMPROVEMENT DISTRICT NO. 1, CITY OF LITTLE ROCK, ARKANSAS, APPELLANT

v.

FEDERAL RESERVE BANK OF ST. LOUIS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a special tax assessment levied by an improvement district on real property owned by the Federal Reserve Bank of St. Louis violates the immunity of an instrumentality of the United States from state and local taxation under the Supremacy Clause (Article VI, Clause 2) of the United States Constitution.

2. Whether the waiver of immunity of Federal Reserve Banks from real estate taxes under 12 U.S.C. 531 extends to special tax assessments.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Agricultural Bank v. *Tax Commission*, 392 U.S. 339	6
Board of Directors of Red River Levee District v. *Reconstruction Finance Corp.*, 170 F.2d 430	5, 7
City of Detroit v. *Murray Corp.*, 355 U.S. 489	2
Department of Employment v. *United States*, 385 U.S. 355	3
Des Moines Bank v. *Fairweather*, 263 U.S. 103	6-7
Fagan v. *Chicago*, 84 Ill. 227	5-6
Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95	4
Federal Land Bank v. *Priddy*, 295 U.S. 229	4
Federal Reserve Bank v. *City of Memphis*, 515 F. Supp. 63, aff'd, 649 F.2d 462	4
Federal Reserve Bank v. *Commissioner of Corp. & Taxation*, 499 F.2d 60	4
Federal Reserve Bank v. *Kalin*, 77 F.2d 50	4-5
Illinois Central R.R. v. *Decatur*, 147 U.S. 190	6
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110, 122	6
Knox National Farm Loan Association v. *Phillips*, 300 U.S. 194	4
Lee v. *Osceola Improvement District*, 268 U.S. 643	5
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316	5, 6
Mullen Benevolent Corp. v. *United States*, 290 U.S. 89	5

Cases—Continued Page

Owensboro National Bank v. *Owensboro*, 173 U.S. 664 4
Raichle v. *Federal Reserve Bank*, 34 F.2d 910 5
Swords v. *Nutt*, 11 F.2d 936 6
United States v. *Allegheny County*, 322 U.S. 174 6
United States v. *Anderson Cottonwood Irrigation District*, 19 F. Supp. 740 5
United States v. *City of Adair*, 539 F.2d 1185, cert. denied, 429 U.S. 1121 ..... 5, 7
Van Brocklin v. *Tennessee*, 117 U.S. 151 5
Wisconsin Central R.R. v. *Price County*, 133 U.S. 496 5

Constitution and statutes:

United States Constitution, Article VI 2
Act of May 25, 1948, ch. 334, Section 5, 61 Stat. 205, 15 U.S.C. (Supp. II 1946) 607 7
Rev. Stat. 5219 (1875 ed.) 6
12 U.S.C. 221 *et seq.* 4
12 U.S.C. 222-223 4
12 U.S.C. 241 4
12 U.S.C. 281-290 4
12 U.S.C. (& Supp. IV) 301-305 4
12 U.S.C. 531 ..... 2, 3, 6
2C Ark. Stat. Ann.:
§ 20-404 (1968) 2
§ 20-414 (1968) 2
§ 20-416 (1968) 2
§ 20-418.1 (1968) 2
§ 20-1604 (Cum. Supp. 1981) 2
Little Rock, Ark. Ordinance 13,196 (Sept. 7, 1976) 2

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v.

FEDERAL RESERVE BANK OF ST. LOUIS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The memorandum opinion of the district court (J.S. App. 22-33) is reported at 492 F. Supp. 353. The opinion of the court of appeals (J.S. App. 16-21) has not yet been reported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 33-34) was entered on August 11, 1981. A notice of appeal to this Court was filed on October 9, 1981 (J.S. App. 35). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2), which authorizes appeal to this Court from decisions of courts of appeals where a state statute has been held unconstitutional as applied. See *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 492 (1958).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Article VI of the United States Constitution, and 12 U.S.C. 531 are set forth in J.S. 2-3. The relevant provisions of 2C Ark. Stat. Ann. §§ 20-404, 20-414, 20-416, 20-418.1 and 20-1604 (1968 & Cum. Supp. 1981), and Little Rock, Ark. Ordinance 13,196 (Sept. 7, 1976) are set forth in J.S. 2-7.

STATEMENT

Appellant is a central business improvement district created by the City of Little Rock under Arkansas law for the purpose of constructing and operating a shopping mall, sidewalks, plazas, landscaping, fountains, etc. Pursuant to state law, the cost of the improvements was assessed upon the real property within the district according to the benefits received. Appellee Federal Reserve Bank of St. Louis owns real property located within the improvement district. Appellee was assessed an annual levy of $12,854 payable from 1977 through 2002 (J.S. App. 16-17, 22).

Appellee refused to pay the assessment and commenced this suit in the United States District Court

for the Eastern District of Arkansas, seeking a declaratory judgment that the assessments are invalid because (1) as a federal instrumentality, appellee is constitutionally immune from state and local taxation; and (2) it is exempt from all taxes except real estate taxes by 12 U.S.C. 531. The district court found that appellee was not an instrumentality of the federal government for purposes of the special assessment, and that the exemption from taxes granted appellee by 12 U.S.C. 531 did not relieve appellee from paying special assessments (J.S. App. 22-23, 33).

The court of appeals reversed (J.S. App. 16-21). It held that appellee is a federal instrumentality and therefore is immune from state and local taxation (including special assessments) unless waived by Congress, and that the waiver of immunity from real estate taxes under 12 U.S.C. 531 does not extend to special assessments. Finally, the court noted that because congressional waiver of immunity is required, the failure of the Bank timely to contest the assessment was irrelevant (J.S. App. 20-21).

ARGUMENT

1. The court of appeals correctly held that appellee is an instrumentality of the federal government and therefore immune from state and local taxation. As this Court has observed, there is no simple test for determining whether an institution is so closely related to a governmental activity as to become a tax-immune instrumentality of the United States. The inquiry begins, however, with its congressional authorization and governmental supervision. *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966). The federal reserve

banks are part of the Federal Reserve System established by Congress in 12 U.S.C. 221 *et seq.* The powers granted by statute to the federal reserve banks are governmental functions regarding the financial structure and fiscal policy of the nation (J.S. App. 19, n.3). The number, location, capital and stock of the federal reserve banks are strictly provided for by Congress. 12 U.S.C. 222-223 and 281-290. Control and supervision of federal reserve banks are vested in boards of directors (12 U.S.C. (& Supp. IV) 301-305), which in turn are supervised by the Board of Governors of the Federal Reserve System. The members of the Board of Governors of the Federal Reserve System are appointed by the President with the advice and consent of the Senate. 12 U.S.C. 241.

As the court below correctly observed (J.S. App. 19), many types of federally chartered financial institutions, whose link to the federal government is more attenuated than the federal reserve banks, have been held to be instrumentalities of the federal government, including national banks (*Owensboro National Bank* v. *Owensboro*, 173 U.S. 664, 667-668 (1899)); national farm loan associations (*Knox National Farm Loan Association* v. *Phillips*, 300 U.S. 194, 202 (1937)); and federal land banks (*Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941); *Federal Land Bank* v. *Priddy*, 295 U.S. 229, 231 (1935)). Moreover, other courts of appeals have consistently held that federal reserve banks are instrumentalities of the federal government. *Federal Reserve Bank* v. *Commissioner of Corp. & Taxation*, 499 F.2d 60 (1st Cir. 1974); *Federal Reserve Bank* v. *City of Memphis*, 515 F. Supp. 63 (W.D. Tenn. 1979), aff'd, 649 F.2d 462 (6th Cir. 1981); *Federal*

Reserve Bank v. *Kalin*, 77 F.2d 50, 51 (4th Cir. 1935); *Raichle* v. *Federal Reserve Bank*, 34 F.2d 910, 916 (2d Cir. 1929).

2. As a federal instrumentality, appellee is immune from involuntary exactions, including special assessments, by state and local governments. Appellant does not question the doctrine that federal instrumentalities are constitutionally immune from taxation by state and local governments (see *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), but argues (J.S. 12) that the immunity does not extend to special assessments such as those involved here. To the contrary, this Court and others have long recognized that property of the United States and its instrumentalities is immune not only from taxation but from involuntary assessments by state and local governments for improvements or benefits conferred. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89 (1933); *Lee* v. *Osceola Improvement District*, 268 U.S. 643 (1925); *Wisconsin Central R.R.* v. *Price County*, 133 U.S. 496, 504 (1890); *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 162 (1886); *United States* v. *City of Adair*, 539 F.2d 1185 (8th Cir. 1976), cert. denied, 429 U.S. 1121 (1977); *Board of Directors of Red River Levee District* v. *Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948); *United States* v. *Anderson Cottonwood Irrigation District*, 19 F. Supp. 740 (N.D. Cal. 1937). The theory underlying the federal government's immunity from state and local taxation and from benefit assessments is the same: "The power to levy taxes or impose assessments for benefits can only be exercised on the governed, and not on the governing power, whether State or Federal." *Van Brocklin* v. *Tennessee*, *supra*, 117 U.S. at 162, citing *Fagan* v. *Chicago*, 84 Ill. 227, 233-

234 (1876). See also *M'Culloch* v. *Maryland, supra,* 17 U.S. (4 Wheat.) at 428, 435.

Appellant's reliance (J.S. 12-13) on *Illinois Central R.R.* v. *Decatur,* 147 U.S. 190 (1893), is misplaced. That case held that where a state statute incorporating a railroad exempted from taxation land granted to the railroad by Congress, the obligation of the state had not been impaired by a special assessment on two lots owned by the railroad to defray the cost of grading and paving a street in the City of Decatur. Although the Court distinguished general property taxes from special assessments, that case simply did not involve property of the federal government that would be constitutionally immune from involuntary exactions imposed by state or local governments of the type at issue here.[1]

3. Finally, as the court below correctly held (J.S. App. 20-21), the waiver of immunity of federal reserve banks from real estate taxes under 12 U.S.C. 531 does not extend to special assessments. Congressional consent to state and local taxation of federal properties and functions must be clear, express and unambiguous. *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 122 (1954); *United States* v. *Allegheny County,* 322 U.S. 174, 176-177 (1944); *Agricultural Bank* v. *Tax Commission,* 392 U.S. 339, 343-345 (1968); *Des Moines Bank* v. *Fairweather,* 263 U.S.

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[1] *Swords* v. *Nutt,* 11 F.2d 936 (9th Cir. 1926), cited by appellant (J.S. 13), is likewise distinguishable. There, the issue was purely statutory, *i.e.,* whether a special assessment on property held by the receiver of a national bank complied with the requirement of Rev. Stat. 5219 (1875 ed.) that property taxes on property of national banks be levied according to value as other real property is taxed. That issue is entirely unrelated to the question in this case.

103, 106 (1923); *United States* v. *City of Adair*, *supra*, 539 F.2d at 1188. A congressional waiver of immunity from "real property taxes" has, in several contexts, been held not to extend to special assessments. *City of Adair*, *supra*, 539 F.2d at 1188-1189; *Board of Directors of Red River Levee District* v. *Reconstruction Finance Corp.*, *supra*, 170 F.2d at 433. As a result, after that question arose with respect to the 1943 and 1944 special assessments dealt with in *Red River Levee District*, *supra*, Congress amended the Reconstruction Finance Corporation Act to provide expressly that "any real property of the Corporation shall be subject to special assessments for local improvements * * *." Act of May 25, 1948, ch. 334, Section 5, 61 Stat. 205, 15 U.S.C. (Supp. II 1946) 607. In contrast, no similar provision has been adopted with respect to federal reserve banks.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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2

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REPLY TO AMICUS CURIAE BRIEF OF THE SOLICITOR GENERAL FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Cases

Board of Directors of Red River Levee District v. Reconstruction Finance Corp., 170 F.2d 430 (8th Cir. 1948) 2

Lee v. Osceola Improvement District, 268 U.S. 643 (1925) 2

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 3

Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933) 3

United States v. Anderson Cottonwood Irrigation District, 19 F. Supp. 740 (N.D. Cal. 1937) 2

United States v. Buffalo, 54 F.2d 471 (2d Cir. 1931) 4

United States v. City of Adair, 539 F.2d 1185 (8th Cir. 1976) 2

Van Brocklin v. Tennessee, 117 U.S. 151 (1886) 4

Wisconsin Central R.R. Co. v. Price County, 133 U.S. 496 (1890) 3

United States Constitution

U.S. Const. art. VI, cl. 2 1

U.S. Const. art. I, sec. 8, cl. 1 3

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REPLY TO AMICUS CURIAE BRIEF OF THE SOLICITOR GENERAL FOR THE UNITED STATES

At the invitation of the United States Supreme Court, the Solicitor General for the United States filed an *amicus curiae* brief on the questions presented by appellant Metrocentre Improvement District No. 1, Little Rock, Arkansas ("District"). Although the District disagrees with the analysis and conclusions reached by the Solicitor General in his brief, the District directs this response only to the Solicitor General's discussion of whether immunity from taxation of an agency or instrumentality of the United States based upon the Supremacy Clause of the United States Constitution (Art. VI, cl. 2) includes immunity from assessment by a local improvement district. The Federal

Reserve Bank of St. Louis has refused to pay an assessment for benefits conferred to its property located within the District.

The Solicitor General correctly observed that the District does not question the doctrine that federal instrumentalities are constitutionally immune from taxation by state and local governments. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Solicitor General, however, incorrectly asserted as follows:

> [T]his Court and others have long recognized that property of the United States and its instrumentalities is immune not only from taxation but from involuntary assessments by state and local governments for improvements or benefits conferred. *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933); *Lee v. Osceola Improvement District*, 268 U.S. 643 (1925); *Wisconsin Central R.R. v. Price County*, 133 U.S. 496, 504 (1890); *Van Brocklin v. Tennessee*, 117 U.S. 151, 162 (1886); *United States v. City of Adair*, 539 F.2d 1185 (8th Cir. 1976), cert. denied, 429 U.S. 1121 (1977); *Board of Directors of Red River Levee District v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948); *United States v. Anderson Cottonwood Irrigation District*, 19 F. Supp. 740 (N.D. Cal. 1937). (Brief, p. 5)

The case which is the source of the holdings in the string of cases cited above is *Van Brocklin v. State of Tennessee*, 117 U.S. 151 (1886). In *Van Brocklin*, the United States acquired three lots which were sold to the United States for nonpayment of direct taxes assessed thereon. The provisions authorizing the United States to sell the land for nonpayment of taxes and to purchase the land for the amount of the taxes (if no one would bid a higher price) were viewed by the Court as a necessary and proper means for carrying into effect the power to lay and collect the taxes under Article I, Section 8, clause 1 of the United States Constitution. *Van Brocklin*, *supra* at 179. The United States

Supreme Court stated that during the time that the United States held the title to the property as security for the payment of the taxes, the State could not tax the property. The Court held that all state taxes imposed on the land owned by the United States were unlawful. A tax imposed by the State of Tennessee could not be used to deprive the United States of title to property that it lawfully acquired under express acts of Congress.

Although *Van Brocklin* is cited for the proposition that constitutional immunity based on the Supremacy Clause extends to special assessments, that case did not involve the imposition of a special assessment for benefits conferred to the real property of an instrumentality of the United States. The facts of the case did not require the United States Supreme Court to consider the historical distinction between taxes and special assessments for benefits conferred. In spite of this fact, *Van Brocklin* is cited as the major authority for the cases relied upon by the Solicitor General for the United States. *See, e.g., Mullen Benevolent Corp. v. United States*, 290 U.S. 89, 91 (1933); *Lee v. Osceola & Little River Road Improvement Dist. No. 1 of Mississippi County, Arkansas*, 268 U.S. 643, 645 (1925); *Wisconsin Central Railroad Co. v. Price County*, 133 U.S. 496, 504 (1890).

In *Lee v. Osceola Improvement District, supra*, the issue of whether property owned by the United States was subject to assessment was not contested and the Supreme Court did not address or make any finding on that issue.

In *Wisconsin Railroad Co. v. Price County, supra*, the Supreme Court was faced with the issue of taxation and not assessment for benefits conferred on real property. Once again, the Supreme Court did not address the issue which is involved in this case on appeal.

In *Mullen Benevolent Corporation v. United States, supra*, the Supreme Court again blurred the distinction

between taxes and assessments. Two cases, *Van Brocklin v. Tennessee, supra*, and *United States v. Buffalo*, 54 F.2d 471 (2d Cir. 1931), were cited as authority for language concerning assessments. In reality, both cases were concerned with taxes.

Although the Supreme Court, in *Illinois Central Railroad v. Decator*, 147 U.S. 190 (1893), made clear the distinction between taxation and special assessments for benefits conferred on real property, the other Supreme Court cases cited by the Solicitor General have failed to make this same distinction, either because the issue was apparently not contested or was not material to the decision. The Supreme Court has never specifically focused on, analyzed and addressed the issue of whether Supremacy Clause immunity actually extends to assessments for benefits conferred on real property owned by an instrumentality of the United States. The District respectfully submits that this issue should be resolved by the Supreme Court and that briefs on the merits and oral arguments should be permitted.

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